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JUN 25
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 166

JOHNSON & HIGGINS OF CALIFORNIA,

Petitioner,

v.

THE UNITED STATES.

MOTION OF ATLANTIC MUTUAL INSURANCE COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE

J. M. RICHARDSON LYETH,
Counsel for Atlantic Mutual
Insurance Company as *Amicus Curiae.*

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No.

JOHNSON & HIGGINS OF CALIFORNIA,
Petitioner,
v.
THE UNITED STATES.

Motion for Leave to File Brief as Amicus Curiae.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Atlantic Mutual Insurance Company, respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in connection with the application of the petitioner in this case for a writ of certiorari.

J. M. RICHARDSON LYETH,
Counsel for Atlantic Mutual
Insurance Company as *Amicus Curiae.*

We hereby consent to the filing of the annexed brief by the Atlantic Mutual Insurance Company as *amicus curiae* in connection with the application for a writ of certiorari by Johnson & Higgins of California.

CLETUS KEATING,
Counsel for Petitioner,
Johnson & Higgins of California.

.....,
Counsel for Respondent,
The United States.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No.

JOHNSON & HIGGINS OF CALIFORNIA,
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v.
THE UNITED STATES.

BRIEF OF ATLANTIC MUTUAL INSURANCE COMPANY AS AMICUS CURIAE.

I.

Preliminary Statement.

The Atlantic Mutual Insurance Company is plaintiff in a suit now pending in the United States Court of Claims in which it seeks to recover the sum of Forty-eight thousand ninety-nine and 40/100 Dollars ($48,099.40) with interest, alleged to be owing to it as a contribution in general average by the United States as owner of the Transport "Logan" and of certain cargo carried on the Transport "Logan" on a voyage from San Francisco to Manila, which began on December 5, 1918. The Atlantic Mutual Insurance Company insured other

cargo belonging to the Government of the Philippine Islands and to the Manila Railroad Company against marine risks, including fire, and upon payment for the damage to such goods by reason of the extinguishing of the fire by the flooding of the hold, it became subrogated to such claims as the owners of that cargo had in general average against the owner of the vessel and the owners of other cargo on board. This was the same voyage with respect to which the petitioner in this case, Johnson & Higgins of California, was employed by the War Department to prepare a general average statement. The Court of Claims denied recovery to Johnson & Higgins of California for the amount of their charges for services in preparing such general average statement, upon the ground that there had in fact been no general average because cargo had been carried free of any charge for freight. This holding by the Court of Claims, if not reversed, will bar recovery in the suit brought by the Atlantic Mutual Insurance Company and now pending in the Court of Claims but not yet tried. The Atlantic Mutual Insurance Company believes the decision of the Court of Claims in the suit brought by Johnson & Higgins of California, is erroneous for the reasons hereinafter stated in this brief and therefore respectfully urges that the petition by Johnson & Higgins of California for a writ of certiorari to the Supreme Court of the United States should be granted.

II.

Argument.

POINT A.

The Court of Claims erred in holding that there could be no general average unless freight is paid by cargo.

General average has been recognized by the maritime law since ancient times. Its purpose is to avoid the injustice which would be inflicted on the owner of cargo which is jettisoned or otherwise destroyed for the benefit of all interests at risk in the voyage, if the owner of the cargo thus destroyed were required to bear the entire loss and the interests benefited made no contribution thereto. Its purpose also is to leave the Master free to exercise his discretion as to the best means to be taken to extricate a vessel from a situation of danger, without the necessity of considering whether the loss would fall upon one cargo owner or another or upon the vessel owner. Otherwise, in times of peril, the Master might desire to protect one cargo owner as against another, or might unwisely sacrifice cargo rather than some portion of the ship. This is well stated in Lowndes' General Average, 6th Ed., at pages 14 and 15, as follows:

> "Nothing can more tend to the preservation of life and property at sea than that the officer entrusted with this important function should be protected in the exercise of it from whatever may tend to bias or disturb his judgment at that critical moment. He is, however, the paid servant of the shipowner, liable to dismissal if he displeases him. How is he to avoid partiality, or the suspicion of partiality, when he has to determine by what sacrifice he shall avert a common danger, and to choose, perhaps, between a jettison of cargo and the cutting away of a mast, or

> bearing up for a port of refuge? Will there not be frequent complaints, well or ill-founded, by the merchant or his underwriters, that a costlier sacrifice of cargo has been preferred when a measure less destructive, but involving a loss to the shipowner would have been equally effectual? The rule of a general contribution, on the other hand, by rendering it immaterial whose property is taken in the first instance, and material only that that should be taken which will most surely and effectually, and at least cost, save the whole, does away with this conflict in the captain's mind between interest and duty, leaves him alone with purely nautical considerations, and thus, no doubt, does more than any statesman or philanthropist can effect for the preservation of life and property at sea. The utility of the rule of general average thus no doubt explains its universality and permanence."

The foregoing considerations are particularly important where, as in the case of the Transport "Logan," the owner of the vessel was also the owner of part of the cargo.

Where the sacrifice is made for the common benefit of all interests at risk in the voyage, the law of general average therefore requires that the loss be apportioned amongst all the interests benefited. Thus in *Hobson* v. *Lord,* 92 U. S. 397, the Court said:

> "Sacrifices, voluntarily made in the course of a voyage, of part of the ship, or part of the cargo, to save the whole adventure from an impending sea peril, or extraordinary expenses incurred for the joint benefit of both ship and cargo, and which became necessary in consequence of a common peril of the kind, are regarded as the proper objects of general average."

The duty to contribute in general average arises by reason of the receipt of the benefit of the sacrifice by interests which were not sacrificed. Such duty to contribute is broadly equitable in nature and is not de-

pendent upon the existence of any express contract in any specific form.

In *Swift & Co.* v. *Glasgow Steam Shipping Co.,* 280 Fed. 910, the bill of lading provided that goods were carried at the owner's risk. Nevertheless, the District Court held that this did not bar general average. Likewise in *Crooks* v. *Allan,* 5 Q. B. D. 38, an exception in the bill of lading relieved the ship owner from liability for all damage that could be insured against. General average could be insured against, but the ship owner was nevertheless held liable to contribute in general average. The duty to contribute in general average is thus not dependent upon liability of the ship owner for loss or damage to the goods.

The Court of Claims in its opinion held that in the present case there was "no common purpose, no joint enterprise or adventure in which defendant was concerned," because freight was not paid. This, it is respectfully submitted, is erroneous and is based upon a confusion as to what constitutes the "common adventure" which is the starting point of general average. The Court of Claims apparently assumed that there must be a common economic enterprise, i. e., that the cargo must be bound to the ship by contracts for which valuable consideration had been given. The common adventure, however, which is the basis of general average, is the fact that cargo goes to sea in a vessel and that the two encounter perils of the sea together. The adventure is the physical subjection of both hull and cargo concurrently to the perils of the sea. The fundamental purpose of general average, namely, the equitable distribution of loss and the consequent elimination of any bias in the captain's mind as to which interest should be sacrificed in time of peril, is present whenever cargo goes to sea in a vessel, regardless of whether or not freight is paid.

In further proof of the erroneous nature of the result reached by the Court of Claims is the fact that general

average is always adjusted between cargo shipped by different persons, although there is no contract between them, nor is there any consideration which passes from one cargo owner to the other. *Carver, Carriage of Goods by Sea* (7th Ed.), Sec. 364. The cargo which is saved by the sacrifice must nevertheless contribute its share to make good the loss to the owner of the cargo which was sacrificed.

Moreover, it has been held that where vessel and cargo are owned by the same owner, there can still be general average. *Montgomery & Co.* v. *Indemnity Mutual Insurance Co.* (1902), 1 K. B. 734. At page 740, the Court said:

> "The object of this maritime law seems to be to give the Master of the ship absolute freedom to make whatever sacrifice he thinks best to avert the perils of the sea, without any regard whatsoever to the ownership of the property sacrificed; and, in our judgment, such a sacrifice is a general average act, quite independently of unity or diversity of ownership."

In *Potter* v. *Providence Washington Insurance Company,* 19 Federal Cases No. 11,336, both ship and cargo were owned by the plaintiff, but the ship alone was insured. The plaintiff sued the underwriter for reimbursement for general average, and the underwriter claimed as a deduction the amount of general average owing to the plaintiff, as owner of the ship, with respect to the cargo owned by the plaintiff. Mr. Justice STORY held the deduction to be valid. See also *Greely* v. *Tremont Insurance Company,* 9 Cushing 415; *La Fonciere, etc.* v. *Dollar,* 181 Fed. 945.

The payment of freight by cargo is therefore in no sense a requisite to the liability of the owner of either ship or cargo to contribute in general average.

POINT B.

The Supreme Court should grant the petition for Writ of Certiorari because of the importance of a correct decision on a basic question of general average.

This is believed to be a case of first impression on the question whether an obligation to pay freight is a necessary condition to the recovery of a general average contribution by the owner of cargo. This in turn involves the converse proposition, should a vessel owner be barred from recovering general average from cargo which he was carrying free? Counsel have been unable to find any decisions in point other than those referred to in Point A.

This question relates to the fundamental basis of the law of general average, and it is of the utmost importance that it should be correctly decided.

General average has always been founded upon broad equitable grounds, and it would be unfortunate to have a decision which based the obligation of general average upon the narrow technical question whether there was consideration for the carriage of cargo paid or payable to the vessel owner. It is respectfully submitted that the various cases cited above show that the decision of the Court of Claims is based upon a serious misapprehension as to the basic purpose and nature of general average, and is not in accord with the existing decisions and the general maritime law as to general average.

CONCLUSION.

The petition for Writ of Certiorari should be granted by the Supreme Court.

Respectfully submitted,

J. M. RICHARDSON LYETH,
Counsel for Atlantic Mutual
Insurance Company as *Amicus Curiae.*